IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT.

Kundan Singh
vs.
Shri Pustimargiya Tritya Peeth Pranayas and others.

S.B. Civil Misc. Appeal No.498/2006 against the Order dated 28.3.2006 passed by the learned Additional District Judge (Fast Track), Rajsamand in Case No.45/2005.

Date of Judgment : December 21th, 2006.

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. JP Joshi a/w Mr.SG Ojha, for the appellant.

Mr. PS Bhati) for the respondents.
Mr. Usman Gani)
Mr. JP Bhardwaj)

BY THE COURT :

REPORTABLE

Heard learned counsel for the parties.

This appeal is against the order of the trial court dated 28.3.2006 passed on an application filed by the plaintiff/appellant under Order 39 Rules 1 and 2 CPC. The trial court dismissed the injunction

application filed by the appellant in a case where the appellant filed the suit for specific performance of oral agreement dated 26.6.2005.

Brief facts of the case are that according to the appellant, the respondent no.1 is a trust and the respondents no.2 to 6 are its trustees. The respondent no.1's agriculture land is having khasra nos.21 to 23, 29 to 31, 37 to 39, 43 and 44. The appellant for the purpose of marble mining operations in the said land sought consent letter of the respondent no.1 trust. The respondent no.1 agreed on 26.6.2005 to give the consent letter for a consideration of total Rs.70 lakhs. According to the appellant, he paid Rs.10 lakhs in cash on 26.6.2005 to the respondent no.2 in the presence of other trustees. It was decided that the appellant will pay Rs.50 lakhs by 15.9.2005 by demand draft and remaining Rs.10 lakhs will be paid by the appellant at the time of submitting the consent letter of the respondent trust before the mining department. As per the agreed condition, the consent letter of the respondent trust shall remain in force for 20 years from the date of grant of lease by the mining department for marble mining. It is stated that the respondent trust through its trustees agreed that they will not breach the contract on any condition nor the respondents will put any obstruction in the execution

of the work. There was negative covenant also that the respondents will not give the consent letter to any other party. For not obtaining the written agreement, the explanation of the appellant is that the respondent no.2 is the Chief trustee of the respondent trust and is head of the Pusti Margiya Sampradaya where he is treated as God and no one can question the integrity of the respondent no.2, therefore, the written contract was not obtained because of faith and position of respondent no.2. The appellant in furtherance to the said agreement dated 26.6.2005 obtained the demand draft of Rs.50 lakhs in the name of the respondent trust. Copy of the draft was sent by fax on 13.9.2005 to the respondent no.6, one of the trustee, which according to the appellant is in furtherance to the directions given by the trustees. Subsequently, after 13.9.2005, the appellant came to know that the respondent no.2 – Chief trustee is staying at Kankroli town in Rajasthan itself. Therefore, the appellant went to Kankroli so that the demand draft of Rs.50 lakhs may be handed over to the respondent no.2. The respondent no.2 told the appellant that the respondent no.2 will be staying at Kankroli for two more days, therefore, he will take the draft afterwards but when the appellant went to the respondent no.2 on 16.9.2005, he found that the respondent no.2 already left Kankroli town. This attitude of the respondent no.2 created doubt in the

mind of the appellant. The appellant also heard from others that the respondents are making efforts to give consent letter to other persons. The appellant thereafter found that the respondents are doing this because of the reason that the respondent no.11 is Minister in the Government of Rajasthan and he is putting pressure upon the respondent no.2 for giving consent letter. The appellant because of his urgent work went to Jaipur on 18.9.2005 and from there, he contacted trustees – Navneet, Sharad Bhai, Govind Bhai as well as the chief trustee – Shri Brijesh Kumar Goswami on telephone. The appellant informed them that in the market persons are saying that the respondent no.1 is about to give consent letter to the other person. The respondent no.2 gave evasive reply to the appellant and asked him to come to Baroda on 20.9.2005. The appellant also talked with the other trustees on telephone and he recorded the conversation on tape. On 19.9.2005, the appellant started for Baroda but when he reached Ahmedabad, he got information on telephone that the respondent no.2 has already given consent letters to the respondents no.7 to 10 and got it registered also. The appellant returned back from Ahmedabad and collected all information and obtained copy of consent letter from the office of Sub-Registrar. According to the appellant, the respondents no.7 to 10 themselves told people of Town Kankroli that despite having

knowledge of prior agreement with the appellant, they put pressure upon the respondent no.2 to give the consent letter in their favour. Not only this, but for a contract having consideration of Rs.70 lakhs, the respondents no.7 to 10 could obtain the consent letter for a consideration of Rs.3,85,000/- only. Not only this, the respondents no.7 to 10 did not pay that amount of Rs.3,85,000/- in one time but they are to give Rs.35,000/- per hectare per year. According to the appellant, the said consent letter is against the interest of the trust also and in violation to the public policy.

The appellant/plaintiff in his suit submitted application for grant of temporary injunction and sought relief that the respondents no.7 to 10 may be restrained from operating the mine. The plaintiff also sought the relief against the respondents no.12 to 14 – State of Rajasthan ; Director, Mining Department, Government of Rajasthan, Udaipur and Mining Engineer, Rajsamand that they should not issue permission in favour of the respondents no.7 to 10 nor they should accept royalty from them. The plaintiff submitted his affidavit in support of the injunction application.

The respondents no.1 to 5 – Trust and its trustees submitted reply through their power of attorney, respondent no.5 – Nagin Bhai Parakh. In the reply filed

by the trust and trustees, it was contended that their are two more trustees namely, Parag Kumar Goswami and Shishir Kumar but they have not been impleaded as party in the suit, therefore, the suit is not maintainable. It was also submitted that respondent no.6 – Govind Bhai Shah is not trustee and he has been wrongly impleaded in the suit. So far as agreement dated 26.9.2005 is concerned, that was denied by the trust and trustees. The respondents no.1 to 5 also denied receipt of payment of Rs.10 lakhs or receipt of fax copy of the demand draft of Rs.50 lakhs. It is also submitted that even if copy of draft was sent by the plaintiff to Govind Bhai that is irrelevant because of the fact that Govind Bhai is not trustee. It was further stated that they had no knowledge about the fact whether the plaintiff talked with Navneet Bhai, Govind Bhai or respondents no.2 to 5 on phone from Jaipur on 18.9.2005. It is also submitted that the Trust already gave consent letter in favour of respondents no.7 to 10 and, therefore, injunction application may be dismissed. In support of the reply on behalf of the respondents no.1 to 5, said power of attorney – Nagin Bhai submitted his affidavit.

The respondents no.12 to 14 – State and its functionaries filed reply to the injunction application and took a plea that against the issuance of mining

patta, some persons have filed writ petition before the High Court, therefore, the present suit is not maintainable. It is also submitted that the plaintiff could have preferred an appeal under Rule 43 of the Minor Mineral Concession Rules and, therefore, in view of the alternate effective remedy, the Court may not grant injunction in favour of the appellant. It was also stated that the notice under Section 80 CPC was not given to the respondent State and State functionaries, therefore, the suit is not maintainable. It was also submitted that as per Clause 12 of the Marble Policy, the mining patta was issued by the department in favour of the respondent transferor.

The respondents no.7 to 10 denied all the allegations made in the plaint by the plaintiff. They denied the agreement between the plaintiff and the respondents no.1 to 6. For tape conservation, it is submitted that the tape cannot be admitted in evidence. They justified their contract and the consent letter dated 15.9.2005 which was registered in their favour on 16.9.2005. They pleaded that they are bonafide transferee for valuable consideration without notice of any prior agreement and, therefore also, the appellant is not entitled to any relief. It is also submitted that in addition to consideration of Rs.35,000/- per hectare for surface rent, the respondents no.7 to 10

agreed to give Rs.60 lakhs by cheque which is not refundable amount and income out of interest from said Rs.60 lakhs will be Rs.7,20,000/- per year and thereby, the respondent no.1 trust will get Rs.11,05,000/- per year.

The trial court dismissed the injunction application filed by the plaintiff/appellant, after observing that this is a case of oral contract and there is no evidence evidencing the contract between the plaintiff and the respondent no.1 trust through its trustees except the tape recorded conversation. The trial court held that the tape recorded conversation is a weak piece of evidence. However, the trial court observed that it may be believed that there may be good relations of the plaintiff with the respondent no.2 – Chief trustee of the respondent no.1 trust but the plaintiff failed to disclose from where he paid Rs.10 lakhs and for that he should have submitted statement of his bank account so that it could have been ascertained that the plaintiff paid Rs.10 lakhs to the respondent no.2 on 26.6.2005. It is also observed by the court below that the plaintiff did not produced his books of accounts also. In substance, the trial court found that there is no prima-facie evidence of agreement between the appellant and the respondents no.1 to 6 for giving consent letter by the respondent

no.1 trust through its trustees to the appellant. The trial court also held that the plaintiff failed to prove (prima-facie) that the respondents no.7 to 10 had knowledge of the plaintiff's alleged agreement. The trial court further held that in view of provisions of Transfer of Property Act, by virtue of agreement for sale (in this case for obtaining consent letter for mining operation), no right is created in favour of the appellant in the property involved in the transaction. However, because of the agreement, obligation can be created upon the transferor in favour of the transferee but till that obligation is discharged by the vendor, the appellant cannot get any interest in the property. The trial court rejected the appellant's objection about respondents no.7 to 10 not paying proper stamp duty for the consent letter obtained and objection that the transaction between the respondent no.1 and respondents no.7 to 10 is against the public policy and, therefore, the contract is null and void and no right of respondents no.7 to 10 is created by virtue of said void transaction. The trial court, therefore, found that the appellant failed to establish prima-facie case. While deciding the question of balance of convenience and irreparable injury, the trial court held that prima-facie the respondents no.7 to 10 are bonafide purchasers without notice of any prior agreement and obtained the possession, therefore, the

decree cannot be granted to restrain the respondents no.7 to 10 from operating the mine.

Being aggrieved against the order of the trial court dated 28.3.2006, this appeal is preferred by the appellant/plaintiff.

Learned counsel for the plaintiff/appellant vehemently submitted that the oral agreement is also enforceable in law. The appellant clearly pleaded that the respondent no.1 trust entered into agreement with the appellant for transfer of rights in the immovable property mentioned above for the purpose of mining operation. The appellant paid huge amount of Rs.10 lakhs to the trustees of the respondent no.1 trust. The respondent no.2 being Chief Trustee and head of one Community, is respected by all as God and, therefore, because of that faith in the respondent no.2, the written agreement was not executed. The total consideration of transaction is Rs.70 lakhs and the appellant before due date i.e. 15.9.2005, obtained a demand draft in the name of the respondent no.1 trust on 13.9.2005 and faxed it to respondent no.6 Govind Bhai, who according to the appellant was trustee. It is also submitted that the tape recorded conversation which the appellant quoted in his suit as well as in the application clearly reveals that the respondent

no.2 to 6 on behalf of the respondent no.1 trust entered into agreement for transfer of rights in immovable property for a consideration of Rs.70 lakhs.

Learned counsel for the appellant vehemently submitted that the appellant's case has not been rebutted by the respondents no.1 to 6 which is apparent from the record itself. The respondents no.1 to 5 though submitted reply but through power of attorney holder and only power of attorney filed the affidavit in support of the reply. The power of attorney personally had no knowledge about the transaction between the appellant and the respondents no.1 to 5. Therefore, the affidavit submitted by the power of attorney is no evidence in the eye of law in support of the contentions raised by the respondents no.1 to 6. Learned counsel for the appellant pointed out that in reply to injunction application, the respondents no.2 to 6, who had personal knowledge whether the appellant talked with them on telephone, merely submitted that they had no knowledge whether the appellant talked with the trustees or not, as is clear from the facts replied in para no.10 at page 11 of the reply. From the reply, it is clear that the reply has been filed by the person who even had no knowledge from the respondent trustees which otherwise would have been a hearsay evidence only but even that hearsay evidence is also not on record. According to learned counsel for the appellant, the

trial court did not reject the tape recorded conversation between the parties narrated in the suit and the injunction application by observing that the tape recorded conversation is a weak piece of evidence but while deciding prima-facie case, the trial court observed that the appellant has not produced any evidence in support of his oral agreement. Therefore, the order of the trial court is self contradictory. The trial court held that by virtue of the agreement, obligation in favour of the appellant is there but because of obligation of respondents no.1 to 6 only, injunction cannot be granted. That view of the court below is legally wrong because of the simple reason that obligation of one creates right in another and in this case, obligation upon the respondents no.1 to 6 was for due performance of the contract in favour of the appellant and by that, the appellant got legal right to enforce the agreement.

It is also submitted by learned counsel for the appellant that the respondents no.7 to 10 are not bonafide transferees which is apparent from the facts as the respondents no.7 to 10 obtained the contract for petty amount of Rs.35,000/- per hectare per year against the appellant's consideration in the agreement of Rs.70 lakhs. It is also submitted that the respondents have not paid the proper stamp duty and, therefore, no right has been created in favour of the

transferees.

The appellant also submitted an application under Section 151 CPC for taking on record certain documents. The appellant contended in the said application that the respondents no.7 to 10 have taken stand before the trial court that the possession of the land in question was handed over to them by the respondents no.1 to 6 and thereafter, the respondents started mining operations on the land in question. That stand of the respondents no.7 to 10 is in derogation and defiance of the orders passed by this Court in writ petitions no.6008/2005, 6066/2005 and 6411/2005. According to the appellant, the High Court while admitting the writ petition no.6008/2005 not only stayed the operation of the order dated 23.9.2005 but restrained the respondents from taking possession of the land in question in pursuance of the order dated 23.9.2005 and further directed that the respondents shall maintain status quo with respect to the land in question. In writ petition no.6411/2005, the High Court by order dated 26.10.2005 restrained the respondents from excavating the mine in question. According to the appellant, the court below was influenced by the fact that the possession has been taken over by the respondents no.7 to 10 as they are bonafide transferees and since they started mining operations on the land in question, therefore, they are entitled to use the land

but in view of the orders passed by this Court in the writ petitions referred above, the stand of the respondents no.7 to 10 is factually wrong. The matter was taken up before the Hon'ble Apex Court when the writ petitions referred above were dismissed by this Court on 14.1.2006. The Hon'ble Apex Court in Special Leave Petition filed by M/s. Mewar Marbles passed an interim order to the effect that “stay in the meanwhile”. The appellant has placed on record the copy of the order dated 23.9.2005 as Annex.A/1, order dated 26.10.2005 as Annex.A/2, interim order passed by the Hon'ble Apex Court as Annex.A/3. With the help of these orders, the appellant submitted that the respondents no.7 to 10 are not bonafide purchasers nor they are in possession of the land in question nor they could have operated the mine.

Learned counsel for the appellant relied upon the Division Bench judgment of this Court delivered in the case of Jagir Singh vs. Ranjeet Singh and others reported in 2005(4) WLC (Raj.) 447 wherein the Division Bench held that mere denial by the subsequent purchasers that they had no notice of the plaintiff's earlier agreement and that they paid price in good faith is not sufficient to discharge the defendants' burden of proof and mere denial is only the plea which cannot become evidence. It also has been held that the

defendant is to discharge primary burden and then onus goes on the plaintiff. The issue of bonafide purchaser for valuable consideration is required to be determined by all the circumstances since there can be no direct evidence of fraud.

Learned counsel for the appellant also relied upon the judgment of Hon'ble Apex Court delivered in the case of S. Partap Singh vs. State of Punjab reported in AIR 1964 SC 72 wherein it has been held that the tape recording is admissible in evidence and cannot be rejected on the ground of the possibility of they being tampered with.

Learned counsel for the appellant also relied upon the judgment of Hon'ble Apex Court delivered in the case of Ziyauddin Burhanuddin Bukhari vs. Brijmohan Ramdass Mehra and others reported in AIR 1975 SC 1788 wherein while considering the evidentiary value of tape recorded speeches, the Hon'ble Apex Court held that the tape recorded speeches are documents as defined in Section 3 of the Evidence Act which stand on no different footing than photographs and they are admissible in evidence on satisfying certain conditions.

The tape recorded conversation is admissible in evidence has been approved by the Hon'ble Apex Court in the judgment delivered in the case of R.M. Malkani vs. State of Maharashtra reported in AIR 1973 SC 157

wherein it has been held that the tape recording is admissible in evidence.

Learned counsel for the appellant also relied upon the judgment of this Court (by me) delivered in the case of Ameer Mohammed vs. Barkat Ali reported in AIR 2002 Rajasthan 406 wherein it has been held that oral agreement can be enforced and that the decree for specific performance of contract is discretionary and for that purpose, the Court should base its decision on sound and reasonable judicial principles and not arbitrarily.

Learned counsel for the appellant also relied upon the judgment of Hon'ble Apex Court delivered in the case of Brij Mohan and others vs. Sugra Begum and others reported in (1990) 4 SCC 147 wherein it has been held that the contract for sale may be oral. The same view with respect to the oral agreement was taken by the Hon'ble Apex Court in the case of Kollipara Sriramulu (dead) by his legal representative vs. T. Aswatha Narayana (dead) by his legal representative and others reported in AIR 1968 SC 1028.

Learned counsel for the appellant also submitted arguments in the form of synopsis and copy of two criminal complaints filed under Section 138 of the Negotiable Instruments Act by the respondents no.1 to 7 against the respondents vendors because of dishonour of cheque dated 27.9.2005 of Rs.15 lakhs.

Learned counsel for the respondents purchasers vehemently submitted that the trial court was fully justified in dismissing the injunction application of the appellant because of the simple reason that the appellant failed to produce any evidence with respect to the alleged oral agreement and further failed to show how the purchasers had knowledge of the said alleged agreement dated 26.5.2005. It is pointed out by learned counsel for the respondents purchasers from the reply filed by the respondents no.1 to 5 that the respondents vendors in para no.14 clearly stated that the respondents denied any conversation with the appellant which the appellant alleged that he recorded. It is submitted by Learned counsel for the respondents that the respondents bonafidely entered into the contract for transfer of surface right and paid the consideration and got the document registered in their favour. The respondents no.12 to 14 issued pattas in favour of the respondents no.7 to 10 in accordance with law on the basis of consent letter given by the respondents vendors. It is also submitted that even if there was some talk for transfer of rights in favour of the appellant, then that was not a concluded contract.

In reply to the application filed by the appellant under Section 151 CPC, the respondents vendors submitted that the plea taken by the appellant is

belated one and the facts about the writ petitions are pertaining to absolutely different relief and has no connection with the present controversy like the contract in favour of the appellant and further stated that the respondents no.7 to 10 are bonafide transferors.

Learned counsel for the respondents no.1 to 5 – trust and its trustees also supported the order passed by the court below.

Learned counsel for the respondent purchasers relied upon the judgment of Hon'ble Apex Court delivered in the case of Jagan Nath vs. Jagdish Rai and others reported in AIR 1998 SC 2028 wherein on the basis of evidence on record establishing that the subsequent purchasers was bonafide purchaser for value without notice of earlier agreement with the plaintiff, the plaintiff was not held entitled to relief of specific performance against the subsequent purchaser.

Learned counsel for the respondent purchasers also relied upon the judgment of Hon'ble Apex Court delivered in the case of Lourdu Mari David and others vs. Louis Chinnaya Agrogiaswamy and others reported in AIR 1996 SC 2814 wherein the Court found that the person claiming specific performance but not coming with clean hands is not entitled to equitable relief

for decree of specific performance.

I considered the submissions of the learned counsel for the parties and perused the record as well as the judgments cited.

There is no dispute with respect to the proposition that for grant of injunction, the plaintiff is required to prove his case by his evidence. Once the plaintiff discharges his burden of proof, then onus shifts upon the defendant. In the present case, the plaintiff has filed the suit for specific performance of contract on the basis of oral agreement, therefore, the first issue is that whether there was oral agreement between the plaintiff and the respondent no.1 trust through its trustees. Since, it is the case of the plaintiff/appellant himself of oral agreement, admittedly, there is no written document evidencing the contract. In a case seeking specific performance of oral contract, it is the duty of the appellant to plead facts and place on record all relevant evidence before the Court along with the plaint itself. It will be beneficial to take help of decision of this Court (by me) in Ameer Mohammed's case (supra) :-

> “When the plaintiff bases his suit for specific performance on the basis of the oral agreement of sale of immovable property then it is duty to

disclose all material facts and particulars with all the conditions of the agreement and the surrounding circumstances including the fact that if oral agreement was entered into between the parties then whether it was in presence of any person and if there was any mediator who was he and what negotiations took place and if the agreement was acted upon then all the material particulars ; how it was acted upon which includes the writing of any document by the parties, including the payments, mode of payment, receipt it was executed or the transaction was entered into books of accounts and what are the entries which are in the handwriting of other party. These basic facts are required to make the other party know about the detail facts which will be used by the party seeking performance of the contract against the other party, so that the other party can take his defences. It also avoids chances of subsequent improvement otherwise it may put the other party in disadvantageous position. It can safely be said that by not getting a document in writing for sale of immovable property, the purchaser takes a serious risk because normally there appears no reason for non-execution of an agreement for sale evidencing the transaction containing the terms and conditions when it is a case of immovable property. Even if the oral agreement is permissible under the law and is enforceable through the Court of law even then the plaintiff is required to prove the oral agreement with certainty so that the Court can enforce the agreement to sell in entirety and unless and until all the conditions are not before the Court relating to the contract requiring performance by the parties then the Court cannot enforce the

> agreement which is required to be enforced specifically and not generally."

This Court further held in the above case as under:-

> "The requirement of formal deed is not mandatory requirement for enforcement of contract even then it may be one of the circumstance which may go against the party seeking performance of oral agreement. It is also true that the suit cannot be rejected on the basis of the absence of formal deed of agreement for sale but the plaintiff will then be required to prove the oral agreement as a whole by trustworthy evidence."

Apart from this fact, no reason has been disclosed by the plaintiff for not obtaining the receipt of payment of Rs.10 lakhs which according to the plaintiff, he has paid to the respondent no.1 trust in cash on 26.6.2005. Even if for the sake of arguments, it is believed that for a contract having consideration of Rs.70 lakhs because of faith in the respondent no.2 – Chief Trustee, the plaintiff could not demand a written agreement but so far as payment of Rs.10 lakhs is concerned, prima-facie, there is no reason to believe that he will not obtain a receipt may it be on plain paper for said payment of Rs.10 lakhs from any of the persons i.e. from respondents no.2 to 6. There is no explanation why the receipt was not demanded by the

plaintiff and was not given by the respondents. It is true that there is no specific objection of the defendants about the capacity of the plaintiff for paying Rs.10 lakhs to the respondent trust but when the appellant filed a suit for specific performance of oral contract that too where the registered deed has already been executed by vendors in favour of another vendor, then it was the duty of the appellant to plead full and complete facts by which it can be reasonably believed that there was agreement for sale by vendor in favour of the plaintiff. The plaintiff is also required to plead and place on record all evidence along with the plaint itself. Further because of the plaintiff relied upon circumstantial evidence, therefore, important material circumstance was payment of Rs.10 lakhs and for which the appellant did not obtain receipt from the vendors. The appellant should have pleaded the fact about Rs.10 lakhs which, according to him, he paid to the vendors. Even if looking to the total transactions, the appellant might have been ready with the cash, then for that purpose, he could have pleaded that he had money ready with him and he should have submitted the relevant documents to show that he paid the cash amount and entered that payment in his books of accounts and should have disclosed his source. From where, he got the money, may it be in past much before he entered into agreement with the respondents vendors.

This was all the more necessary when the respondents vendors denied receipt of Rs.10 lakhs in their reply. If the plaintiff missed to place on record the circumstantial evidence for payment of Rs.10 lakhs to vendors along with the plaint, he could have submitted documentary evidence when denial of vendors came on record. Not only this, but the vendor did not produce this evidence in appeal before this Court. Therefore, not only that there is no written agreement but there is lack of important material evidence about the actual payment of Rs.10 lakhs by the appellant to the respondents on 26.6.2005. As stated above, the initial burden was upon the appellant to prove the agreement and since the alleged agreement is oral, therefore, all the circumstances from which it can be reasonably inferred that there was oral agreement and for that purpose, he could not have relied upon only on the weakness of the respondents, if it is there.

Another relevant fact is that according to the appellant himself, he was supposed to pay Rs.50 lakhs to the respondent no.1 trust by demand draft, then sending copy of demand draft through fax on 13.9.2005 is not a circumstance which can be readily believed. When the draft was ready with the appellant, he could have straightaway sent it to the respondent trust or any of the trustees. The behaviour of the appellant in sending copy of draft by fax is not normal behaviour

and prima-facie it appears to be an effort of creating documentary evidence. Why the plaintiff/appellant sent the copy of demand draft to the vendors by fax ? Was there any doubt in the mind of plaintiff about the intention of the vendor even on 13.9.2005 ? What was the reason for satisfying the vendors that the appellant is ready with demand draft of Rs.50 lakhs ? This conduct of the appellant even may cast some doubt about the transaction. The further circumstance is that according to the appellant himself, he found that the Chief Trustee (respondent no.2) of the respondent trust is available at Kankroli Town and he went there to hand over the draft of Rs.50 lakhs to the Chief Trustee but the Chief Trustee did not accept the draft from the appellant. This circumstance, according to the appellant, took place on 15.9.2005. The respondent no.2 did not accept the draft only on the plea that there are two more days for payment of Rs.50 lakhs and, therefore, the appellant may pay the draft in next 2 days as the respondent no.2 will be in Kankroli Town for two more days. That fact situation is also very strange. The vendee was ready to pay the amount of Rs.50 lakhs on 15.9.2005 or before a day or 2 days but the vendor was not ready to accept the consideration, still no doubt developed in the mind of the appellant despite the assurance of the respondent no.2 that he will be in Kankroli Town but the respondent no.2 left

Kankroli on or before 16.9.2005 without taking amount of Rs.50 lakhs from the appellant. His case is that because of some urgent work, the appellant went to Jaipur on 18.9.2005 and from there, he talked with the trustees of the respondent trust namely, Navneet Bhai, Sharat Bhai and Govind Bhai as well as respondent no.2 – Chief Trustee and he recorded the conversation on tape. The conversation recorded by the appellant on tape has been quoted by the appellant in his injunction application also. The appellant himself admitted that he has quoted some of the portions out of the tape recorded conversation. The tape recorded conversation with respondents no.3 and 4 was recorded on 18.9.2005. Prima-facie from the replies which were given by the respondents no.3 and 4 (if that is talk of appellant with respondents), it is not safe to draw inference without corroborative evidence about the concluded contract between the appellant and the respondents vendors and for that, there is one more reason and that why the appellant did not talked with the chief trustee and if talked did not record the conversation on tape for the reason best known to the appellant only. Further, most of the questions for which answers have been given by the respondents no.3 and 4, they are not very clear and the questions suggest that the appellant tried his best to get out of the mouth of the respondents no.3 and 4. Therefore also, prima-facie,

the said tape conversation recorded by the appellant cannot be accepted as piece of evidence proving the actual contract between the appellant and the respondents without corroborative evidence which is not available on record. In view of the above, if the trial court observed that the tape recorded conversation is weak piece of evidence, meaning thereby, did not rely upon the said weak evidence and held that there is no evidence in support of the appellant's plea of oral agreement and payment of Rs.10 lakhs, the trial court has not committed any error of fact or law.

At this stage, it may be observed that there may be possibility that out of faith in other, one may not demand written documents of contract but in that situation, heavy burden was upon the person seeking enforcement of contract to place all the circumstances which he could have placed on record in support of his plea of oral agreement which includes the circumstances anterior to the agreement as well as subsequent to the agreement. The circumstances anterior to the agreement are the preparations for entering into the agreement and in case, there were talks with number of persons, then how those talks took place, what were the exact terms and conditions of the agreement, what was the exact payment made by the prospective vendee and how that payment was made. In case, where there is no

receipt for payment from vendors, then the other circumstance from which the appellant can prove that in fact, he paid the consideration in cash, are the circumstances which normally are required to be pleaded first and not dependent upon the plea taken by the vendor who in this case already by his conduct denied the contract by executing registered deed in favour of the third person.

In the present case, the appellant not only did not disclose the source from where he paid the consideration of Rs.10 lakhs to the appellant before the court below, to meet with the ground for rejection of the appellant's application for grant of injunction by the trial court, the appellant did not produce any additional evidence in this appeal which he could have submitted with the leave of the Court.

The Division Bench of this Court in Jagir Singh's case (supra) considered the plea of bonafide purchaser for valuable consideration in good faith and without notice of prior agreement and held that the defendant's plea that he had no knowledge of the prior agreement in itself is not sufficient to discharge the burden of the defendant that he had no knowledge of the prior agreement and he is bonafide purchaser. That position comes when the plaintiff discharges his burden of

proving the contract in his favour and in case, where the appellant prima-facie failed to establish by evidence his contract, then consequence is presumption in favour of the defendant that the defendant is purchaser of the property without notice of any agreement. If there is no prior agreement, there cannot arise question of knowledge of any earlier agreement to defendants so as to cast burden upon the defendant to prove his plea of bonafide purchaser in good faith without notice of earlier agreement. The question of burden upon the defendant in such case arises only where there is evidence of earlier agreement. In this case, in the opinion of the court below and in the opinion of this Court also, there is no trustworthy evidence in support of the plaintiff's oral agreement, therefore, the judgment of Jagir Singh's case (supra) is not of any help to the plaintiff/appellant.

In view of the judgment referred above, of Hon'ble Apex Court, now it cannot be disputed that the tape recorded conversation can be admitted in evidence and specific performance of oral agreement can be enforced is also now well settled law. But in the present case, looking to the transcription of the tape recorded conversation and because of lack of corroborative evidence and all other circumstances referred above, the plaintiff/appellant failed to establish his prima-

facie case.

It is true that the respondents no.1 to 6 have filed reply to the injunction application through power of attorney and annexed affidavit of power of attorney and the power of attorney cannot be witness to give evidence on behalf of his principle and in this case, the power of attorney failed to plead how he had knowledge about the facts with respect to the transaction which according to the appellant took place between the appellant and the respondents no.2 to 6. But, as observed above from the appellant's own case, the appellant failed to prove prima-facie case in his favour even if the affidavit of the power of attorney of the respondents is ignored. The power of attorney may not give evidence in some circumstances but the principal can act through power of attorney, therefore, the pleas taken by the respondents no.2 to 6 through the power of attorney in their reply, sufficiently controverts the facts alleged by the appellant in his application and it cannot be treated that for want of denial of facts by the respondents no.1 to 6, the appellant's case can be deemed to have been admitted. The respondents vendors also controverted the facts stated by the appellant and they denied having knowledge of the earlier agreement between the vendors and the appellant.

The appellant before the appellate court by moving application under Section 151 CPC tried to condemn the act of the respondents and tried to show that the respondents are not bonafide transferees. The respondents submitted that the subject matter in the writ petitions mentioned above was with respect to the entirely different controversy and has no relevancy in the present suit. In case of concluded contract and acting upon by the parties on that contract, if something remains due in one party of other party, then that itself cannot be accepted as evidence for want of bonafide of the purchasers in all cases. Non-payment of periodical installment by the purchasers in the present circumstances may be because of very many reasons due to which, the appellant cannot claim any benefit.

In view of the above reasons and the reasons given by the trial court in brief, the finding of the trial court on question of prima-facie case is decided against the appellant/plaintiff.

The respondents, who got the registered deed in their favour, cannot be denied the right arising out of the transaction between the respondents vendors and respondents vendees looking to the nature of the transaction and issuance of patta by the respondent State in favour of the vendors are the circumstances in

favour of the vendors, therefore also, the court below has not committed any illegality in deciding the issue of irreparable injury and balance of convenience in favour of the respondents.

In view of the above discussion, the appeal of the appellant, having no force, is hereby dismissed.

(PRAKASH TATIA) ,J.

s.phophaliya